FILED
MAY 28 1969
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted]
1171

IMPERIAL REFINERIES OF MINNESOTA, INC.
Appellant

vs.

THE CITY OF ROCHESTER
Respondent

APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

STATEMENT AS TO JURISDICTION

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333-3539 Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415 333-3530

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In the
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OCTOBER TERM, 1969

No.

IMPERIAL REFINERIES OF MINNESOTA, INC.
Appellant

vs.

THE CITY OF ROCHESTER
Respondent

APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

STATEMENT AS TO JURISDICTION

The appellant, pursuant to *United States Supreme Court Rule* (13) 2 and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Minnesota Supreme Court, upholding the constitutionality of the Minnesota Statutes pertaining to the construction of public improvements, to-wit, sewers, water mains and water towers, and assessing the property owners for the cost thereof.

OPINION BELOW

The opinion of the Supreme Court of Minnesota, affirming the judgment of the District Court, is reported in 165 N.W. Rep. 2d Series, p. 699.

JURISDICTION

The appeal herein is from a final judgment of the Supreme Court of the state of Minnesota, upholding the constitutionality of a Minnesota Statute relating to the construction of public improvements and assessing the property owners for the cost thereof pursuant to the 1953 Minnesota Statutes, and amending *Minnesota Statute*, Sections 429.01 to 429.18 of Volume 25 of Minnesota Statutes Annotated (Sections 429.011 to 429.111, including Section 429.081, this being the Pocket Part for use in the year 1969, Appendix B, p. 1).

The City of Rochester, Olmsted County, Minnesota, constructed a sanitary sewer, water main and water tower in the district wherein appellant owned certain city lots and assessed the expenses of said construction against this appellant.

The final judgment appealed from was made and entered on February 28, 1969, and is appended to this statement in Appendix A at pp. 1 to 9 inc. Notice of the appeal was filed in the Supreme Court of the state of Minnesota on April 8, 1969.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of.

28 U.S.C. Sec. 1257 (2).

The following decisions are believed to sustain the ju-

risdiction of the Supreme Court of the United States to review on direct appeal there from:

American Oil Company v. Neil, 380 U.S. 451 (1965);
Bantam Books, Inc., et al. v. Sullivan, 372 U.S. 58 (1962);
Cramp v. Board of Pub. Inst., Orange County, Fla., 368 U.S. 278 (1961);
People of State of Illinois v. Board of Education, 333 U.S. 203 (1947);
Standard Oil Co. of California v. Johnson, 316 U.S. 48 (1942).

The Minnesota Statute involved is Sections 429.011 to 429.111 (and particularly Section 429.081 of the *Laws of 1953*, as appears in the Pocket Part of the Minnesota Statutes Annotated, Volume 25.

The text of this statute is set out verbatim in Appendix B. p. 1.

QUESTIONS PRESENTED

(1) Does Section 429.081 of the *Minnesota Statutes* for the year 1953, which provides that the aggrieved property owner has twenty days to appeal to the District Court from the adoption of the assessment by the Common Council but makes no provision of any nature for notice to the property owner of the adoption starting this twenty-day period to appeal, violate the rights of the property owner as to the notice required by the due process clause of the 14th Amendment to the United States Constitution?

(2) Does the fact that the City Council gave notice that on April 6, 1964 they would consider the assessment, at

which hearing a representative from the appellant appeared, and then the amount of the assessment not being approved and the special assessment not being made until June 1, 1964, satisfy the defect in Section 429.081 in not providing for a notice to the property owner of the approval and confirmation of the assessment, starting the twenty-day period in which to appeal (see Section 429.061, Appendix C, pp. 1, 2, 3), and it appearing from the record that nothing was done in the way of continuance of the hearing after April 6, 1964 or any notice given to appellant as required by said statute and Section 429.061 has no provision for notice to the property owner of the adoption of the assesssment or that the adoption has taken place. (See reply brief page 13, paragraph 1.)

(3) Does Section 429.081 of *Minnesota Statutes* of 1953, by failing to provide notice to the property owner, stating that the assessment has been adopted, violate the due process clause of the 14th Amendment to the United States Constitution (Appendix B, p. 1)?

STATEMENT OF CASE

The City of Rochester, situated in the county of Olmsted, state of Minnesota, in the year 1964 constructed a sanitary sewer system, a water main, and water well and tower in the vicinity wherein this appellant owned several tracts of land and assessed the claim of benefits against this appellant, all under claimed Minnesota statutory authority; that this was brought under *Minnesota Statutes Annotated,* as amended, in 1953, Sections 429.011 to 429.111, as appears in Volume 25 thereof, Cumulative Annual Pocket Part to Minnesota Statutes Annotated, to be used in the year 1969, providing as follows (429.081):

> "Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the district court by serving a notice upon the mayor or clerk of the municipality. The notce shall be filed with the clerk of the district court within ten days after its service."

This statute is entirely dearth of any provision giving to the property owner notice as to when the confirmation or adoption takes place or when the 20-day period will start to run. Nothing in said statute makes such provision.

The City of Rochester levied an assessment against this plaintiff-appellant in the sum of $17,781.78. This was confirmed on June 1, 1964 (R. p. 7, f. 1). This was pursuant to a hearing noted for April 6, 1964 (R. p. 5, f. 3). No provision is in the record as to any continuances. An emissary from the plaintiff-appellant appeared at this hearing, it being held under Section 429.061 of said *1953 Amendment*, which provided that the council would meet to consider this assessment, that at this April 6, 1964 meeting they only considered the assessment and made no confirmation until June 1, 1964 (R. p. 7, f. 1) see *supra*.

The Statute of 1953 provided that the aggrieved property owner had 20 days to appeal from the adoption by the City of the assessment, which statute was entirely dearth of any notice of any nature, advising the property owner that the adoption had taken place, thereby starting the 20-day period in which to appeal and thereby eliminating the most important element of the due process clause required by the 14th Amendment as heretofore stated.

Imperial Refineries appealed to the District Court, and at the opening of the trial the City of Rochester moved to dismiss, claiming it as an untimely appeal under Section 429.081 of said *1953 Amendment*. At this early stage,

Imperial Refineries (R. p. 36, f. 1) attacked the constitutionality of this Section 429.081 as violating the due process clause of said 14th Amendment. The court took the motion under advisement (R. p. 36, ff. 1 and 2). This was not decided until the findings made April 8, 1967 (R. p. 109, f. 1). A motion for substituted findings or a new trial assigned as error the finding that this statute 429.081 was constitutional (R. p. 116, f. 3). The same assignment was carried on into the Supreme Court of Minnesota by plaintiff-appellant's brief, page 7 thereof, the Supreme Court of Minnesota holding that this section of the statute does not violate the Constitution of the United States under the 14th Amendment.

RESUME

As Section 429.081 of the *1953 Amendment* deprives the plaintiff-appellant, Imperial Refineries of Minnesota, Inc., of any notice that this assessment has been adopted and starting the 20-day period, or stating the 20-day period is about to start, it deprives this plaintiff-appellant of the due process clause granted by said 14th Amendment.

The judgment and confirmation was entered on February 28, 1969, affirming the order of the trial court, which held said Section 429.081 as being constitutional. The order denying a rehearing was entered on March 28, 1969. The notice of appeal to the United States Supreme Court was filed with the Clerk of the Supreme Court of the state of Minnesota on April 9, 1969.

The statutory provisions believed to give this Court jurisdiction of this appeal is *28 U.S.C.*, Section 1257-(2).

The matter was appealed to the District Court of Olmsted County, and in chambers before the trial started the

defendant-respondent moved to dismiss on the ground that the appeal was not timely under Section 429.081, *Minnesota Statutes Annotated*. Thereat, the plaintiff-appellant immediately attacked the validity of this statute (R. p. 35, f. 3; p. 36, f. 1). The court took this under advisement (R. p. 36, ff. 2 and 3) and proceeded to hear the cause. The same question was carried during the consideration of the case. The court made findings in 1967 (R. p. 109, f. 1), holding that this statute, to-wit, 429.081, was constitutional (R. p. 107, f. 2).

In the motion for substituted findings or for a new trial, one assignment was the findings as to the constitutionality of this statute (R. p. 116, f. 3), and said findings were charged as erroneous. The motion was denied and appealed to the Supreme Court of Minnesota. One assignment of error in Supreme Court was the holding that this statute was constitutional (plaintiff-appellant's brief, p. 7). The Supreme Court of the state of Minnesota held that this statute is valid (see Appendix A).

The contention is that the question presented here is that the statute, as written, violates the due process clause of the 14th Amendment to the Constitution of the United States, and the contention is substantial in that the municipalities all over Minnesota are constructing water and sewer mains and water towers, and the question as to whether the property owners are protected by the statute is a most serious question and that these same questions will continually arise to the detriment of many property owners.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The statute in question governs the procedure in all of Minnesota relating to the construction of sewers, water mains and water towers. This is continually being done. The same questions can arise from day to day, causing no end of litigation. This question should be settled. These facts and this question are very substantial.

CONCLUSION

From the foregoing reasons the appellant respectfully submits that this Court has jurisdiction of this appeal under the provisions of Title 28, *U.S.C.* Sec. 1257-(2).

Respectfully submitted,

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Attorney for Plaintiff and Appellant

Dated May —, 1969.

Marshall S Snyder
admitted
March 8t 1934

APPENDIX A

In The Supreme Court
Of The United States Of America

No. 251

IMPERIAL REFINERIES OF MINNESOTA, INC.,
Appellant,

vs.

CITY OF ROCHESTER,
Respondent.

SYLLABUS

1. Minn. St. 429.081, which directs the procedure for appealing from the adoption of an assessment by a city council, is not rendered unconstitutional by its failure to provide for notice of the final action of the council, since the provisions of §§ 429.031 and 429.061 require notice of the hearings at which the assessment is to be considered.

2. The fact a city clerk erroneously specified to an attorney for a property owner the statute under which the city council proposed to levy an assessment did not estop the city from denying it was proceeding in that manner where the attorney in his inquiry to the clerk had alluded to the statute designated by the clerk although such statute had long since been repealed.

3. The fact that an assessment levied for sewer and water improvements against county fairgrounds was disproportionate to that levied against other property did not render the proceedings invalid where the evidence disclosed that the benefits were dissimilar, and, because the fairground was beyond the jurisdiction of the municipality, the assessment against it was voluntarily assumed.

Affirmed.

Heard before Knutson, C. J., and Otis, Rogosheske, Sheran, and Peterson, JJ.

OPINION

OTIS, Justice.

This is an appeal from a judgment of the District Court affirming an assessment by the City of Rochester for sanitary sewer and water main improvements and for water tank and connecting trunkline improvements amounting to approximately $19,000.

Three issues are raised. First, whether the failure to provide for notice of the adoption of the assessment by the City Council renders Minn. St. 429.081 unconstitutional; second, whether the City Clerk's erroneous designation of the statute under which the City was proceeding constitutes an estoppel; and third, whether the assessments for construction of a water tower were properly allocated.

1. The sanitary sewer and water tank projects were initiated by the City Council in 1961 pursuant to Minn. St. 429.031, Subd. 1, without a petition of abutting owners. The appellant, hereafter referred to as Imperial, was the owner of property in the Golden Hill Addition of Rochester affected by these proposals. It was given notice of a

public hearing on the proposed assessment for sewer and water mains to be conducted on April 6, 1964, by the council. A representative of Imperial appeared at that hearing and protested the assessment. A similar hearing with respect to the water tower was held on December 7, 1964, and was also attended by representatives of Imperial, including its counsel.

The assessment as to the water tank was adopted by the council on January 18, 1965. Imperial served notice of appeal to the District Court on the City of Rochester on February 9, 1965, and filed the notice with the Clerk of Court on February 23, 1965. With respect to the water and sewer project, the assessment roll was adopted by the council on June 1, 1964. Notice of that proceeding was acknowledged by Imperial on June 12, 1964. However, it did not serve notice of appeal until July 17, 1964.

Although the District Court held that the notice of appeal with respect to the sewer and water main project was not timely served on the City of Rochester or filed with the Clerk of Court, and that the notice of appeal was respect to the water tank project was not timely filed with the Clerk of Court, it nevertheless heard the appeals on the merits and made findings of fact and conclusions of law accordingly.

Section 429.081 provides in part as follows:

> "Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the district court by serving a notice upon the mayor or clerk of the municipality. The notice shall be filed with the clerk of the district court within ten days after its service."

Because appellant had no notice of the date to which the

final council hearing relative to each project was continued and in order to have a decision on the merits, the City made no issue of the timeliness of the appeals to the District Court. Nevertheless, it is the contention of Imperial that § 429.081 violates the Fourteenth Amendment in that it fails to provide for notice of the confirmation of the assessment. In support of its contention, Imperial cites Meadowbrook Manor, Inc. v. City of St. Louis Park, 258 Minn. 266, 104 N. W. 2d 540. The Meadowbrook case involved an assessment for a sewer project serving the City of St. Louis Park but constructed in the City of Minneapolis, for which property owners in St. Louis Park were assessed without being served with notice except by publication. We held the proceedings unconstitutional and suggested the kind of notice which would correct that infirmity. In response to the Meadowbrook decision, the legislature by L. 1961, c. 525, adopted the notice provisions in Minn. St. 429.031 and 429.061. As amended, the statute now requires notice to be mailed to affected owners advising them of the public hearing on the proposed improvement and of the hearing on the amount to be assessed.

Imperial contends that neither actual notice nor the fact that it was accorded a hearing in District Court on the merits gives vitality to the statute under which the City proceeded if there is a failure to provide for notice of the confirmation, citing Gove v. County of Murray, 147 Minn. 24, 25, 179 N. W. 569, 570. We do not agree.

Although there is some question as to whether the council complied with the statute by stating the date to which it intended to adjourn at the conclusion of its hearing on the ceedings can only be instituted by a petition of 51 percent

of the affected property owners rather than by the action of the City Council, as was done.

There is no merit in this position. In the first place, the error was invited by counsel and not volunteered by the City Clerk. In the second place, whether the erroneous citation of a statute by the clerk might be fatal under different circumstances, it cannot be invoked to defeat these proceedings where the statute cited had long since been repealed and the information was furnished to one who is learned in the law. We hold, therefore, that Imperial was not misled by the information furnished either as to the law or as to the facts.

3. Finally, Imperial complains that as to the sewer and water main project the assessment levied against it was disproportionate to that levied against the county fairgrounds and that as to the water tank project it received no special benefit not generally realized by the City as a whole.

No authority is cited for authorizing an assessment against the county fair property which was located outside of the City limits of the City of Rochester. Imperial argues that the same situation prevailed in the Meadowbrook case. There, however, the City of St. Louis Park was assessing benefits to property within its own city limits, although the improvement was constructed in the City of Minneapolis for use by the city of St. Louis Park. Here the City of Rochester had no jurisdiction over the fairgrounds, but the county board voluntarily consented to assume an assessment proportionate to the benefits it realized. The fairgrounds were already served by a sanitary sewer and had some water service.

It is the contention of Imperial that for purposes of assessing costs of the water main the fairgrounds had 2.634 front feet, and 1,287 front feet for sewer purposes, for which the fairgrounds was assessed only $7,300. Imperial's frontage, on the other hand, was only 1,100 feet for which they were assessed in excess of $18,000. In disposing of this objection, the trial court made the following findings and conclusions which we hold to be supported by the evidence:

> "The lands comprising the Olmsted County Fairgrounds were outside the territorial limits of the City of Rochester at the time the local improvements involved in this proceeding were initiated by the Common Council and at the time assessments were levied and are still outside the territorial limits of the City. The Board of County Commissioners of Olmsted County, Minnesota voluntarily assumed and agreed to pay the cost on a front foot basis of extending the water main along the east side of the fairgrounds property and into the fairgrounds. This extension of the water main past the fairground lands was necessary to provide an adequate supply of water to appellant's land and the other lands in Golden Hill Addition and Garden Acres served and benefited by the improvements. Except as voluntarily agreed and assumed by the Olmsted County Board, the fairground lands were not presently assessable for any portion of the cost of the improvements which are the subject of this appeal.
>
> "The Common Council reasonably determined that no benefits accrued to the Olmsted County Fairgrounds property from the sanitary sewer and water

main improvement beyond the amount voluntarily paid by the County Board for the water main extension along the east side of the fairgrounds property. Sanitary sewer and water main had already been installed to serve the fairgrounds property and the extension of the sanitary sewer through the fairgrounds was for the purpose of providing service to appellant's property and other properties in Golden Hill Addition and Garden Acres served and benefited by the sanitary sewer improvement.

* * * * *

"That the determination of the Common Council of the City of Rochester of properties benefited by the local improvements involved in these appeals is fair, reasonable and accurate. The treatment of the Olmsted County Fairgrounds property was not arbitrary or capricious and must be considered valid and reasonable in the light of all circumstances, including the deferment of a substantial portion of the cost of the water tank and connecting trunk line improvement to be subsequently assessed against benefited properties not presently assessable."

In Village of Edina v. Joseph, 264 Minn. 84, 92, 119 N. W. 2d 809, 815, we held that a City Council is presumed to assess only for special benefits and not for general benefits accruing to the public at large. We went on to say that courts may not substitute their judgment for that of the municipality, that apportionment of assessments is a legislative function which is prima facie valid, and is conclusive on the courts unless the property owner sustains its burden of proving the assessment to be invalid. In the instant case

appellant has failed to sustain that burden, and the judgment of the trial court is therefore affirmed.

Affirmed.

(Title of Cause.)

PETITION

March 28, 1969

(Petition denied)

SIR:

You will please take notice that on this date the following order was entered in the above-entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN,
Clerk Supreme Court.

APPENDIX B

429.081 Appeal to District Court:

"Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the District Court by serving a notice upon the mayor or clerk of the municipality. The notice shall be filed with the clerk of the District Court within ten days after its service. The municipal clerk shall furnish appellant a certified copy of objections filed in the assessment proceedings, the assessment roll or part complained of, and all papers necessary to present the appeal. The appeal shall be placed upon the calendar of the next general term commencing more than five days after the date of serving the notice and shall be tried as other appeals in such cases. The court shall either affirm the assessment or set it aside and order a reassessment as provided in section 429.071, subdivision 2. If appellant does not prevail upon the appeal, the costs incurred shall be taxed by the court and judgment entered therefor. All objections to the assessment shall be deemed waived unless presented on such appeal. Laws 1953, c. 398 § 8, as amended Laws 1961, c. 525, § 9."

APPENDIX C

429.061 Assessment procedure:

"Subdivision 1. Calculation, notice. At any time after a contract is let or the work ordered by day labor, the expense incurred or to be incurred in its making shall be calculated under the direction of the council. The council shall then determine by resolution the amount of the total expense the municipality will pay, other than the amount, if any, which it will pay as a property owner, and the amount to be assessed. Thereupon the clerk, with the assistance of the engineer or other qualified person selected by the council, shall calculate the proper amount to be specially assessed for the improvement against every assessable lot, piece or parcel of land, without regard to cash valuation, in accordance with the provisions of section 429.051. The proposed assessment roll shall be filed with the clerk and be open to public inspection. The clerk shall thereupon, under the council's direction, publish notice that the council will meet to consider the proposed assessment. Such notice shall be published in the newspaper at least once and shall be mailed to the owner of each parcel described in the assessment roll. For the purpose of giving mailed notice under this subdivision, owners shall be those shown to be such on the records of the county auditor or, in any county where tax statements are mailed by the county treasurer, on the records of the county treasurer; but but other appropriate records may be used for this purpose. Such publication and mailing shall be no less than two weeks prior to such meeting of the council. Except as to the owners of tax exempt property or

property taxes on a gross earnings basis, every property owner whose name does not appear on the records of the county auditor or the county treasurer shall be deemed to have waived such mailed notice unless he has requested in writing that the county auditor or county treasurer, as the case may be, include his name on the records for such purpose. Such notice shall state the date, time, and place of such meeting, the general nature of the improvement, the area proposed to be assessed, that the proposed assessment roll is on the file with the clerk, and that written or oral objections thereto by any property owner will be considered.

"Subdivision 2. Adoption. *At such meeting or at any adjournment thereof the council shall hear and pass upon all objections to the proposed assessment*, whether presented orally or in writing. The council may amend the proposed assessment as to any parcel and by resolution adopt the same as the special assessment against the lands named in the assessment roll. *Notice of any adjournment of the hearing shall be adequate if the minutes of the meeting so adjourned* show the time and place when and where the hearing is *to be continued, or if three days notice thereof be published in the newspaper*. The assessment, with accruing interest, shall be alien upon all private and public property included therein, from the date of the resolution adopting the assessment, concurrent with general taxes; but the lien shall not be enforceable against public property as long as it is publicly owned, and during such period the assessment shall be recoverable from the owner of such property only in the manner

and to the extent provided in section 435.19. All assessments shall be payable in equal annual installments extending over such period, not exceeding 30 years, as the resolution determines. The first installment shall be payble on the first Monday in January next following the adoption of the assessment unless the assessment is adopted too late to permit its collection during the following year. All assessments shall bear interest at such rate as the resolution determines, not exceeding six percent per annum. To the first installment shall be added interest on the entire assessment from the date of the resolution levying the assessment until December 31 of the year in which the first installment is payable. To each subsequent installment shall be added interest for one year on all unpaid installments." Note this statute makes no provision for notice to the property owner of the adoption of the assessment starting the 20 day period to appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

IMPERIAL REFINERIES OF MINNESOTA, INC.
Plaintiff-Appellant

VS.

THE CITY OF ROCHESTER
Defendant-Respondent

PETITION FOR REARGUMENT AND RECONSIDERATION OF THE PER CURIAM ORDER OF THE ABOVE ENTITLED COURT DATED OCTOBER 13, 1969, FILE NO. 171

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In the
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OCTOBER TERM, 1969

IMPERIAL REFINERIES OF MINNESOTA, INC.,
Plaintiff-Appellant

VS.

THE CITY OF ROCHESTER
Defendant-Respondent

PETITION FOR REARGUMENT AND RECONSIDERATION OF THE PER CURIAM ORDER OF THE ABOVE ENTITLED COURT DATED OCTOBER 13, 1969, FILE NO. 171

TO THE HONORABLE JUDGES OF THE ABOVE ENTITLED COURT: Eighth Circuit

The petitioner herein states, alleges and shows to this Court:

1. That the undersigned attorney duly received through the United States mail on October 15, 1969, the Notice and Order of this Court dismissing the appeal herein by per curiam decision, stating the reason for want of a substantial federal question, and further states, represents and shows to the Court that even though the amount in controversy is small and not of great consequence, nevertheless it does not come within the rule of de minimus non curat lex, and even though this may be so, the Court should take judicial notice of the fact that the State of Minnesota

has many and varied municipalities and that many and various property owners own property within said municipalities which no doubt will be subject to improvement and taxation as in the case before this Court, and subject to the same rights as are being raised by this appellant, and we respectfully submit that under these conditions a substantial federal question, to-wit: the due process clause of the 14th Amendment, is amply present.

2. The case appealed from is Imperial Refineries of Minnesota, Inc. v. the City of Rochester (Ref. 165 N.W. 2d 699).

3. The jurisdiction of this Court is invoked upon the following grounds:

a. Section 429.081, *Minnesota Statutes Annotated*, as appears in Appendix B, p. 1 of the brief, being Secs. of *Minnesota Statutes Annotated* 429.011 to 429.111, being an amendment to Secs. 429.01 to 429.18 of Vol. 25 of said statutes, as appears in the pocket part to be used in the year 1969 of said Vol. 25, all pertaining to the power of a municipality to construct sewers, water mains and a water tower within its jurisdiction, and giving authority to assess the benefited property owners for the expenses or disbursements thereof. The statute provides for an appeal to the District Court wherein the said improvement is constructed, the time for appeal being twenty (20) days after the adoption of the assessment by the Coomon Council of said municipality wherein the construction has taken place, *but said statute makes no provision for notice to be given to the property owners of the adoption of the assessment for the improvement, thereby starting the 20-day period with which the aggrieved property owner may appeal to the District Court.*

all in violation of the due process clause of the 14th Amendment to the Constitution of the United States (see *U.S. Constitution*, Vol. 14, p. 24), thereby rendering the statute unconstitutional.

4. The trial court and the Supreme Court of Minnesota, in view of the fact that the same question had been raised in both courts, held that the statute is constitutional and valid (R., p. 16, f. 3—see Minnesota Supreme Court decision filed with the brief herein), thereby raising a jurisdictional question in the proceedings (see *Minnesota Statutes Annotated*, Sec. 429.081, as appears in the appendix in the accompanying brief).

5. The jurisdiction of this Court appears in *28 U.S.C. Annotated*, Sec. 1257 (2). The judgment appealed from was entered February 28, 1969. An appeal was filed April 8, 1969.

6. The jurisdiction of this Court is recognized by this Court in the following decisions

Deloach v. Rogers, C.A. Ga. 1959, 268 Fed. 2d 928;
Metlakatla Indians v. Egan, 80 S. Ct. 1321, 363 U. S. 555, 4 L Ed. 2d 1397;
Cohens v. Virginia, 19 U.S. 264, 6 Wheaton 264, 5 L. Ed. 257;
Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423.

7. That this Minnesota statute violates the due process clause of said 14th Amendment is obvious, and appears to be a federal question.

In conclusion, we respectfully request the Court to reconsider this matter, vacate the order of October 13, 1969, and enter this appeal on the docket of this Court.

The undersigned hereby certifies that this motion is taken in good faith and is not interposed for the purpose of any delay in this matter but solely for the purpose of obtaining justice and fair dealings for his client.

Respectfully submitted,

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IMPERIAL REFINERIES OF MINNESOTA, INC.
Plaintiff-Appellant

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Defendant-Respondent

BRIEF IN SUPPORT OF THE ANNEXED AND FOREGOING MOTION
FILE NO. 171

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

IMPERIAL REFINERIES OF MINNESOTA, INC.
Plaintiff-Appellant

VS.

THE CITY OF ROCHESTER
Defendant-Respondent

BRIEF IN SUPPORT OF THE ANNEXED AND FOREGOING MOTION
FILE NO. 171

The facts of the case briefly stated, and if we may in a little repetition of the original petition herein state, the facts, conditions and circumstances of this matter, are as follows:

1. Prior to the year 1953 there existed in the State of Minnesota one certain statute pertaining to the public improvements made or constructed by a municipality within its jurisdiction, which allowed said municipality to collect assessments from the various property owners claimed to have had improvements by said construction of the reasonable and fair value thereof. Said statute provided that upon the confirmation of the assessment the City Clerk would prepare a summary thereof and deliver the same to the City Treasurer who would prepare and publish a notice for period of two (2) weeks, giving the property owners thirty

(30) days after the last publication thereof in which to appeal to the District Court from the assessment as levied by the Common Council. See this statute 429.01 to 429.18, *Minnesota Statutes Annotated*, Vol. 25.

In the year 1953 the Legislature attempted to amend that said statute by passing Secs. 429.011 to 429.111, this including Sec. 429.081, as appears in Appendix B-1 of this brief. This amendment appears in *Minnesota Statutes Annotated*, and it appears in the pocket part of Vol. 25, *Minnesota Statutes Annotated*, to be used in the year 1969, all pertaining to the power of a municipal corporation to construct sewers, water mains and water towers and to assess therefor. This statute passed in 1953, as appears in Appendix B-1, attempted to repeal the prior statute.

2. The City of Rochester attempted to construct sewers, water mains, a water tower, water tank and connections and assessed the property owners, plaintiff-appellant herein, Imperial Refineries of Minnesota, Inc. The appellant paid the assessment under protest, duress and coercion and asked for refund of the money, which has never been refunded (R. p. 48, paragraph 3; R. p. 49, paragraphs 1, 2, 3).

3. Upon appeal to the District Court, the appellant herein attacked the constitutionality of this statute, Sec. 429.081 (R. p. 36, paragraph 1), and also attacked the same in the appeal to the Supreme Court of the State of Minnesota (see appellant's brief in the State Supreme Court, p. 7—ASSIGNMENTS OF ERROR, 1 and 2). The decision in the Supreme Court of the State of Minnesota may be found in 165 N.W. 2d 699. The opinion totedem verbes of the Minnesota Supreme Court appears in Appendix B2.

4. It is the contention of the appellant that Sec. 429.-081 violates the due process clause of the 14th Amendment to the U.S. Constitution, in that it allows the City Council to deprive this appellant of its property without due process of law, according to the said 14th Amendment in that appellant is deprived of any notice of the assessment of confirmation starting the 20-day period in which it can appeal to the District Court. We contend that this fact, together with the rights of all other property owners within the various municipalities of the State of Minnesota, creates a very substantial federal question in this appeal.

5. In support of our contention that the record in this case presents a substantial federal question, the following decisions control, to-wit:

Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 Law Ed. (2) 178:

> "* * * After a hearing, the Kansas trial court denied relief, holding that the newspaper publication providedfor by § 26-202 was sufficient notice of the Commissioners' proceedings to meet the requirements of the Due Process Clause. Agreeing with the trial court the State Supreme Court affirmed 178 Kan 263, 284 P. 2d 1073. The case is properly here on appeal under 28 U.S.C. § 1257 (2). The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases:
>
> "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensa-

tion. The right to a hearing is meaningless without notice. In Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

"Measured by the principles stated in the Mullane case, we think that the notcie by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.

"Nothing in our prior decisions requires a holding that newspaper publication under the circumstances here provides adequate notice of a hearing to determine compensation. The State relies primarily on Huling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559. We think that reliance is misplaced. De-

cided in 1889, that case upheld notice by publication in a condemnation proceeding on the ground that the landowner was a non resident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision."

Wisconsin Elec. Power Co. v. City of Milwaukee, 352 U.S. 948, 77 S. Ct. 324, 1 Law Ed. 2d 241:

"Appeal from the Supreme Court of Wisconsin. Per Curiam: In this case probably jurisdiction is noted. The judgment of the Supreme Court of Wisconsin is vacated and the case is remanded to the Circuit Court for Milwaukee County for consideration in the light of Walker v. City of Hutchinson, 352 U.S. 112.

"Van B. Wake and John F. Zimmermann for appellant. Walter J. Mattison and Harry G. Slater for appellee. Reported below: 272 Wis. 575, 76 N.W. 2d 341."

Your decision in this case did not disclose the facts upon which it is predicated. It is an appeal from the Wisconsin court. The case is reported in 76 N.W. 2d, p. 341, 272 Wis. 575:

"Plaintiff owned certain property in the city of Milwaukee abutting on streets which the city improved in various ways. The city levied assessments against the property for such improvements and, complying with the provisions of the city charter, gave notice by publication to the affected property owners. Plaintiff's original complaint alleged that its property was not benefited by the improvements; that it had no actual notice until it was too late to protest the assessments against its property; and that the constructive notice by publication was inadequate to comply with

the requirements of due process of law. The complaint demanded judgment, declaring unconstitutional the sections of the city charter which make such notice sufficient, and holding null and void the assessments levied pursuant to such notice. The city interposed a general demurrer which was sustained by the circuit court. Upon appeal the Supreme Court divided evenly which, perforce, resulted in an affirmance of the order sustaining the demurrer. This is reported in Wisconsin Electric Power Co. v. Milwaukee, 1953, 263 Wis. 111, 56 N.W. 2d 784. Subsequently a motion by appellant for rehearing was denied." This case establishes that the case at bar is a substantial federal question.

In re Grand Boulevard and Concourse in City of New York, 212 N.Y. 538, 544, 106 N.E. 631, 632:

"It is true that the statute says they shall lose it after the lapse of six years from the filing of the map. To that extent, if no further, the statute must be pronounced invalid. It takes the property of the citizen without actual notice, and without such provisions for constructive notice as are essential to the maintenance of due process of law. It does not require that owners be notified of the filing of the map by which their rights are to be extinguished. It does not confine itself to a provision that the filing of the map shall ipso facto work an appropriation of their interest in the land. That in itself would not, we may assume be invalid, if an adequate remedy insuring compensation were provided. The statute, however, goes farther, and declares that the mere lapse of six years, following the filing of the map, shall, regardless of notice to the owners, bar their right to compensation. It does not avail them that they have remained in undisturbed possession of their lands and unchallenged enjoyment of appurtenant easements. If they fail to keep track

of the maps that define the public highways, their private as well as their public easements may be forfeited without requital. All this is true, if the statute be valid, though neither by actual nor by published notice have they been advised that their rights have been placed in jeopardy. I do not think that such a statute comports with the constitutional guaranty of due process of law. Peterson v. Martino, 210 N.Y. 412, 420, 104 N.E. 916; Bryan v. McGurk, 200 N.Y. 332, 336, 93 N.E. 989; Joslyn v. Rockwell, 128 N.Y. 334, 339, 28 N.E. 604; Blinn v. Nelson, 222 U.S. 1, 32 Sup. Ct. 1, 56 L. Ed. 65, Ann. Cas. 1913B, 555; Longyear v. Toolan, 209 U.S. 414, 28 Sup. Ct. 506, 52 L. Ed. 859; Londoner v. City & County of Denver, 210 U.S. 373, 385, 386, 28 Sup. Ct. 708, 52 L. Ed. 1103; Central of Georgia Ry. Co. v. Wright, 207 U.S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463; American Land Co. v. Zeiss, 219 U.S. 47, 67, 31 Sup. Ct. 200, 55 L. Ed. 82; Cooley's Constitutional Limitations (3d Ed.) 366.

"Before the citizen's right to compensation can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the state. He cannot be charged with the duty of hunting out the facts for himself. The state is appropriating his property by proceedings in invitum, and it cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention. If the act of 1895 makes no provision for such notice, the attempted limitation is without effect. Whether the failure of the limitation carries with it as an additional consequence a failure of the appropriation, we need not now decide. It is possible that the limitation of time within which compensation for the private easements must be claimed is so essential a part of the statutory scheme that if

we blot out the limitation we must blot out the appropriation with it. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635, 636, 15 Sup. Ct. 912, 39 L. Ed. 1108. We may doubt whether the Legislature would have been willing to sanction an automatic condemnation of private easements through the mere filing of a map without setting some bounds to the flood of claims for real or fancied damages."

Hovey v. Elliott, 167 U.S. 409, 42 L. Ed. 215, 17 Sup. Ct. 841:

"In Capel v. Childs, 2 Cromp. & Jern. 558 (1832) the validity of a proceeding by a bishop under an act of Parliament against a church vicar was in question. A requisition upon the vicar to do a certain act was held to be in the nature of a judgment and void, as the party had no opportunity of being heard. Lord Lyndhurst, C B., at p. 574, said:

" 'A party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defense. On consideraton, then, it appears to me that if the requisition of the bishop is to be considered a judgment, it is against every principle of justice that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment.'

In Bonaker v. Evans, 16 Q.B. 162, the main question for consideration was whether a sequestration ordered by a bishop was a proceeding simply in the nature of a distress to compel residence or altogether, or even in part in poenam for previous non-residence. The Court said (p. 171):

" 'If it be the latter, then the bishop ought to have given the incumbent an opportunity of being heard before it was issued: for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offense by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary. This is laid down in Bagg's case, 11 Rep. 93b, 99a; Rex v. The Chancellor & c. of the University of Cambridge (Dr. Bentley's case), 1 Strange, 557; Rex v. Benn, 6 T.R. 198; Harper v. Carr, 7 T.R. 270; and Rex v. Gaskin, 8 T.R. 209; and many other cases, concluding with that of Capel v. Childs, 2 Cromp. & Jer. 558, in which Bayley, B., says he knows of no case in which you are to have a judicial proceedings by which a man is to be deprived of any part of his property, without his having an opportunity of being heard. That case was a very strong one, and shows how firmly the court adhere to that great principal of justice, that, in every judicial proceeding, "Qui aliquid statuerit parte inaudita altera, AEquum licit statuerit non aquus feurit." '

Story; in his treatise on the Constitution (vol. 2, § 1789), speaking of the clause in the Fifth Amendment, where it is declared that no person 'shall be deprived of life, liberty or property, without the due process of law,' says:

" 'The other part of the clause is but an enlargement of the language of Magna Charta, nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vel per lege terrae' (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, per legem ter- and being brought into answer thereto by due process

of law, that is, without due presentment or indictment, and being brought into answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.'

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

Coe v. Armour Fertilizer Works, 237 U.S. 413, 99 L. Ed. 1027, 35 Sup. Ct. 625:

"* * * It would seem plain that any course of procedure having for its objective the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed 'due process of law.' The constitutional guaranty is not to be thus evaded, and we cannot believe there was any purpose to evade it in this case. Upon the whole,

the right of review in this court is clear, and the motion to dismiss the writ of error must be denied."

* * * *

"It may be conceded that a judgment recovered against a corporation, without fraud or collusion, in a court having jurisdiction over the subject-matter and the party, may consistently with the Fourteenth Amendment be treated as concluding the stockholder respecting the existence and amount of the indebtedness so adjudged. Sanger v. Upton, Assignee, 91 U.S. 56, 59; Hawkins v. Glenn, 131 U.S. 319, 329; Glenn v. Liggett, 135 U.S. 533, 544; Great Western Telegraph Co. v. Purdy, 162 U.S. 329, 337. But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself. See Great Western Telegraph Co. v. Purdy, ubi supra; Bernheimer v. Converse, 206 U.S. 516, 528, 532; Converse v. Hamilton, 224 U.S. 243, 256; Selig v. Hamilton, 234 U.S. 652, 660."

* * * * *

"* * *. If a person, against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, or receiving it makes no objection, his property is taken in satisfaction of the corporation's debt—manifestly without due process of law. But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for hearing in the present proceeding as to all questions

upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error. and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N.Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust Co. v .Lexington, 203 U.S. 323, 333, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute' (citing the New York case). So, in Central of Georgia Ry. v. Wright, 207 U.S. 127, 138, the court said: 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere

> matter of favor or grace.' In Roller v. Holly, 176 U.S. 398, 409, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor of discretion.' And in Lous. & Nash. R.R. v. Stock Yards Co., 212 U.S. 132, 144, it was said, 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

Covey, Committee v. Town of Somers, 351 U.S. 141, 10 L. Ed. 1021, 76 Sup. Ct. 724:

> "Appellee argues that the Fourteenth Amendment does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer.
>
> " 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections * * *. (W)hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315.
>
> "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement."

From the foregoing authorities does it not appear that this Court holds that a pretended cause of action which raises a question of due process of law under the 14th Amendment raises a substantial federal question? And can

it not be said that whereas these decisions may not be in exact point on all quarters, do they not infer by reference a holding that the record in this case states a substantial federal question.

The decision cited, paragraph C, page 12 of the Rules adopted June 12, 1967 and effective October 22, 1967 to Mr. Zucht King, 260 U.S. 174-176-177 does not appear to be in point the facts herein. In said case the City of San Antonio, Texas by ordinance required that no child * * * attend public school * * * without having presented a certificate of vaccination, Rosalyn Zucht was excluded because she did not have the required certificate.

Thereupon Rosalyn brought suit for an injunction, writ of mandamous and damages.

A general demurrer was sustained and judgment entered by the Court of Civil Appeals for the Fourth Supreme Court Judicial District, and writ of error to the Supreme Court. Texas was denied, and a petition for a writ of certiorari cause was dismissed for failure to comply with Rule 37, 257 U.S. 650. This case is now here on writ of error granted by Chief Justice of the Court of Civil Appeals.

Now from the facts in the case and the case at bar, there is a vast difference.

In the case at bar the appellant has paid $17,700 plus to the City of Rochester, Minnesota under a statute which deprives him of the protection he has of due process of law, as appears in the 14th Amendment to the constitution of the U.S. of America and this statute if allowed to remain will effect the Constitutional rights of every property owner in any municipality in Minnesota.

Whereas in the *Zucht* case only the vaccination of a girl was in issue.

The Congress by *28 U.S.C. Annotated*, Sec 1257 (2) has provided for this appeal and makes no mention of any substantial federal question.

This statute is vital to numerous citizens residing in the state of Minnesota and therefor is a substantial federal question in issue.

If this motion is denied, we respectfully request a written decision to the end that all of the property owners in this class is advised of the validity of this statute.

Respectfully submitted,

MARSHALL S. SNYDER
2120 Aldrich Avenue South
Minneapolis, Minnesota 55405
Attorney for Appellant

APPENDIX B-1

429.081 Appeal to District Court:

"Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the District Court by serving a notice upon the mayor or clerk of the municipality. The notice shall be filed with the clerk of the District Court within ten days after its service. The municipal clerk shall furnish appellant a certified copy of objections filed in the assessment proceedings, the assessment roll or part complained of, and all papers necessary to present the appeal. The appeal shall be placed upon the calendar of the next general term commencing more than five days after the date of serving the notice and shall be tried as other appeals in such cases. The court shall either affirm the assessment or set it aside and order a reassessment as provided in section 429.071, subdivision 2, If appellant does not prevail upon the appeal, the costs incurred shall be taxed by the court and judgment entered therefor. All objections to the assessment shall be deemed waived unless presented on such appeal Laws 1953, c. 398 § 8, as amended Laws 1961, c. 525, § 9."

APPENDIX B-2

In The Supreme Court
Of The United States Of America

No. 251

IMPERIAL REFINERIES OF MINNESOTA, INC.,
Appellant,

vs.

CITY OF ROCHESTER,
Respondent.

SYLLABUS

1. Minn. St. 429.081, which directs the procedure for appealing from the adoption of an assessment by a city council, is not rendered unconstitutional by its failure to provide for notice of the final action of the council, since the provisions of §§ 429.031 and 429.061 require notice of the hearings at which the assessment is to be considered.

2. The fact a city clerk erroneously specified to an attorney for a property owner the statute under which the city council proposed to levy an assessment did not estop the city from denying it was proceeding in that manner where the attorney in his inquiry to the clerk had alluded to the statute designated by the clerk although such statute had long since been repealed.

3. The fact that an assessment levied for sewer and water improvements against county fairgrounds was dis-

proportionate to that levied against other property did not render the proceedings invalid where the evidence disclosed that the benefits were dissimilar, and, because the fairground was beyond the jurisdiction of the municipality, the assessment against it was voluntarily assumed.

Affirmed.

Heard before Knutson, C. J, and Otis, Rogosheske, Sheran, and Peterson JJ.

OPINION

OTIS, Justice.

This is an appeal from a judgment of the District Court affirming an assessment by the City of Rochester for sanitary sewer and water main improvements and for water tank and connecting trunkline improvements amounting to approximately $19,000.

Three issues are raised. First, whether the failure to provide for notice of the adoption of the assessment by the City Council renders Minn. St. 429.081 unconstitutional; second, whether the City Clerk's erroneous designation of the statute under which the City was proceeding constitutes an estoppel; and third, whether the assessments for construction of a water tower were properly allocated.

1. The sanitary sewer and water tank projects were initiated by the City Council in 1961 pursuant to Minn. St. 429.031, Subd. 1, without a petition of abutting owners. The appellant, hereafter referred to as Imperial, was the owner of property in the Golden Hill Addition of Rochester affected by these proposals. It was given notice of a public hearing on the proposed assessment for sewer and water

mains to be conducted on April 6, 1964, by the council. A representative of Imperial appeared at that hearing and protested the assessment. A similar hearing with respect to the water tower was held on December 7, 1964, and was also attended by representatives of Imperial, including its counsel.

The assessment as to the water tank was adopted by the council on January 18, 1965. Imperial served notice of appeal to the District Court on the City of Rochester on February 9, 1965, and filed the notice with the Clerk of Court on February 23, 1965. With respect to the water and sewer project, the assessment roll was adopted by the council on June 1, 1964. Notice of that proceeding was acknowledged by Imperial on June 12, 1964. However, it did not serve notice of appeal until July 17, 1964.

Although the District Court held that the notice of appeal with respect to the sewer and water main project was not timely served on the City of Rochester or filed with the Clerk of Court, and that the notice of appeal was respect to the water tank project was not timely filed with the Clerk of Court, it nevertheless heard the appeals on the merits and made findings of fact and conclusions of law accordingly.

Section 429.081 provides in part as follows:

> "Within 20 days after the adoption of the assessment, any person aggrieved may appeal to the district court by serving a notice upon the mayor or clerk of the municipality. The notice shall be filed with the clerk of the district court within ten days after its service."

Because appellant had no notice of the date to which the

final council hearing relative to each project was continued and in order to have a decision on the merits, the City made no issue of the timeliness of the appeals to the District Court. Nevertheless, it is the contention of Imperial that § 429.081 violates the Fourteenth Amendment in that it fails to provide for notice of the confirmation of the assessment. In support of its contention, Imperial cites Meadowbrook Manor, Inc. v. City of St. Louis Park, 258 Minn. 266, 104 N.W. 2d 540. The Meadowbrook case involved an assessment for a sewer project serving the City of St. Louis Park but constructed in the City of Minneapolis, for which property owners in St. Louis Park were assessed without being served with notice except by publication. We held the proceedings unconstitutional and suggested the kind of notice which would correct that infirmity. In response to the Meadowbrook decision, the legislature by L. 1961, c. 525, adopted the notice provisions in Minn. St. 429.031 and 429.061. As amended, the statute now requires notice to be mailed to affected owners advising them of the public hearing on the proposed improvement and of the hearing on the amount to be assessed.

Imperial contends that neither actual notice nor the fact that it was accorded a hearing in District Court on the merits gives vitality to the statute under which the City proceeded if there is a failure to provide for notice of the confirmation, citing Gove v. County of Murray, 147 Minn. 24, 25, 179 N.W. 569, 570. We do not agree.

Although there is some question as to whether the council complied with the statute by stating the date to which it intended to adjourn at the conclusion of its hearing on the proposed assessment, that issue is not raised in these proceedings. Under our decision in City of Austin v. Wright,

262 Minn. 301; 114 N.W. 2d 584, we hold that the notice provisions of §§ 429.031 and 429.061 render § 429.081 constitutional. The identical issue was raised in the City of Austin case, which dealt with the failure to give notice of a final order confirming a commissioners' report and award in a condemnation proceeding. We there held that actual notice of the date when the council would act was adequate where the owners had fully participated in the previous proceedings. We therefore hold that the provisions for notice in the statute do not violate the Fourteenth Amendment.

Apart from the question of whether the notice provisions are adequate, it is clear that Imperial has waived its objection to the application of the statute in these proceedings by seeking and obtaining a full hearing on the merits in the District Court.

2. In a letter dated June 23, 1964, counsel for Imperial inquired of the Rochester City Clerk whether these proceedings were instituted under the City Charter or under Minn. St. 429 01 to 529.18 In response, the clerk advised counsel that the assessment was being levied under §§ 429.01 to 429.18. Actually, the proceedings were conducted under §§ 429.011 to 429.111, since §§ 429.01 to 429.18 had been repealed by L. 1953, c. 398, § 13. Imperial contends that notwithstanding the fact the law had been repealed and Rochester is a city of the second class and not a city of the fourth class, to which the prior law applied, the City is estopped from denying that it proceeded under the pealed statutes. Hence, Imperial argues that these proceedings can only be instituted by a petition of 51 percent of the affected property owners rather than by the action of the City Council, as was done.

There is no merit in this position. In the first place, the error was invited by counsel and not volunteered by the City Clerk. In the second place, whether the erroneous citation of a statute by the clerk might be fatal under different circumstances, it cannot be invoked to defeat these proceedings where the statute cited had long since been repealed and the information was furnished to one who is learned in the law. We hold, therefore, that Imperial was not misled by the information furnished either as to the law or as to the facts.

3. Finally, Imperial complains that as to the sewer and water main project the assessment levied against it was disproportionate to that levied against the county fairgrounds and that as to the water tank project it received no special benefit not generally realized by the City as a whole.

No authority is cited for authorizing an assessment against the county fair property which was located outside of the City limits of the City of Rochester. Imperial argues that the same situation prevailed in the Meadowbrook case. There, however, the City of St. Louis Park was assessing benefits to property within its own city limits, although the improvement was constructed in the City of Minneapolis for use by the city of St. Louis Park. Here the City of Rochester had no jurisdiction over the fairgrounds, but the county board voluntarily consented to assume an assessment proportionate to the benefits it realized. The fairgrounds were already served by a sanitary sewer and had some water service.

It is the contention of Imperial that for purposes of assessing costs of the water main the fairgrounds had 2,634 front feet, and 1,287 front feet for sewer purposes, for which the fairgrounds was assessed only $7,300. Imperial's

frontage, on the other hand, was only 1,100 feet for which they were assessed in excess of $18,000. In disposing of this objection, the trial court made the following findings and conclusions which we hold to be supported by the evidence:

> "The lands comprising the Olmsted County Fair grounds were outside the territorial limits of the City of Rochester at the time the local improvements involved in this proceeding were initiated by the Common Council and at the time assessments were levied and are still outside the territorial limits of the City. The Board of County Commissioners of Olmsted County, Minnesota voluntarily assumed and agreed to pay the cost on a front foot basis of extending the water main along the east side of the fairgrounds property and into the fairgrounds. This extension of the water main past the fairground lands was necessary to provide an adequate supply of water to appellant's land and the other lands in Golden Hill Addition and Garden Acres served and benefited by the improvements. Except as voluntarily agreed and assumed by the Olmsted County Board, the fairground lands were not presently assessable for any portion of the cost of the improvements which are the subject of this appeal.
>
> "The Common Council reasonably determined that no benefits accrued to the Olmsted County Fairgrounds property from the sanitary sewer and water main improvement beyond the amount voluntarily paid by the County Board for the water main extension along the east side of the fairgrounds property. Sanitary sewer and water main had already been installed to serve the fairgrounds property and the ex-

tension of the sanitary sewer through the fairgrounds was for the purpose of providing service to appellant's property and other properties in Golden Hill Addition and Garden Acres served and benefited by the sanitary sewer improvement.

* * * * *

"That the determination of the Common Council for the City of Rochester of properties benefited by the local improvements involved in these appeals is fair, reasonable and accurate. The treatment of the Olmsted County Fairgrounds property was not arbitrary or capricious and must be considered valid and reasonable in the light of all circumstances, including the deferment of a substantial portion of the cost of the water tank and connecting trunk line improvement to be subsequently assessed against benefited properties not presently assessable."

In Village of Edina v. Joseph, 264 Minn. 84, 92, 119 N.W. 2d 809, 815, we held that a City Council is presumed to assess only for special benefits and not for general benefits accruing to the public at large. We went on to say that courts may not substitute their judgment for that of the municipality, that apportionment of assessments is a legislative function which is prima facie valid, and is conclusive on the courts unless the property owner sustains its burden of proving the assessment to be invalid. In the instant case appellant has failed to sustain that burden, and the judgment of the trial court is therefore affirmed.

Affirmed.

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

IMPERIAL REFINERIES OF MINNESOTA, INC. *v.* CITY OF ROCHESTER.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 171. Decided October 13, 1969.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question. THE CHIEF JUSTICE took no part in the consideration or decision of this case.